FILED
MAR 11 1968
JOHN F. DAVIS, CLERK

No. 1219

In the

Supreme Court of the United States

OCTOBER TERM, 1967.

PHILLIP SANTORO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT S. BAILEY
LE FEVOUR & BAILEY
Three Madison Street
Oak Park, Illinois 60302
Attorneys for Petitioner

The Scheffer Press, Inc.—ANdover 3-6850

INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	4
REASONS FOR GRANTING THE WRIT	9
1. The failure to conduct an evidentiary hearing on the wiretap issue	9
2. Post-conspiracy declarations of co-defendants	11
CONCLUSION	15
APPENDIX	1a
Opinion of the Court of Appeals	1a

CITATIONS

CASES:

Delli Paoli v. United States, 352 U.S. 232 ..11, 12, 14, 15

Hoffa v. United States, 387 U.S. 231 10

Kolod v. United States, ... U.S. ....., 19 L.Ed. 2d 962 (Jan. 29, 1968) 10, 11

Krulewitch v. United States, 336 U.S. 440 .....12, 14

Lutwak v. United States, 344 U.S. 604 12

Nardone v. United States, 308 U.S. 338 9

STATUTES:

47 U.S.C. 605 .....3, 9, 10

18 U.S.C. 371 ..... 2, 3

18 U.S.C. 2312-2313 ..... 2, 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No.

PHILLIP SANTORO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Your Petitioner, Phillip Santoro, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 27, 1967 affirming a judgment of conviction of Phillip Santoro previously entered in the United States District Court for the Northern District of California.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit dated December 27, 1967 has not yet been reported; it is reprinted herewith as Appendix A. There was no opinion in the District Court.

JURISDICTION

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on seven counts of an indictment charging him with violations of 18 USC 371 (conspiracy) 18 USC 2312 (interstate transportation of stolen motor vehicles) and 18 USC 2313 (sale of stolen automobiles in interstate commerce). He was sentenced on August 16, 1965 to a term of five years imprisonment on Counts 1, 3 and 4, five years imprisonment on Counts 6 and 7, and five years imprisonment on Counts 8 and 9, each of the five year sentences to run consecutively, thereby accounting for a total of 15 years imprisonment. (R 108).[1]

Appeal was taken to the United States Court of Appeals for the Ninth Circuit. That Court affirmed the judgment of conviction in an opinion filed December 27, 1967.

A petition for re-hearing was timely filed and was denied on February 9, 1968.

The jurisdiction of this Court is invoked under provision of Title 18 United States Code Section 1254(1).

QUESTIONS PRESENTED

1. Was the District Court required to hold an evidentiary hearing on defendant's motion to suppress alleging illegal wire-taps by agents of the government?

2. Was the fairness of defendant's trial in the District Court compromised by the admission into evidence of the post-arrest, post-conspiratorial admissions, confessions

---

[1] The record consists of the Clerk's transcript of record, for references to which we have hereinafter used the notation "R", and the reporter's transcript of proceedings in four volumes consecutively paginated for references to which we have used the notation "T".

and false exculpatory statements of co-defendants without sufficient instructions calculated to limit the consideration of such evidence by the jury to the cases of the particular defendants whose statements they were?

STATUTES INVOLVED

18 U.S.C. 371, Conspiracy to commit offense or to defraud United States

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. 2312, Interstate transportation of Stolen Vehicles

> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 2313, Sale or receipt of stolen vehicles

> Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

47 U.S.C. 605, Unauthorized publication or use of communications

> . . . [N]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . .

STATEMENT

On July 19, 1963, defendant Phillip Santoro, in the company of Joseph Coduto and Peter J. La Magna, co-defendants below, was arrested by agents of the Federal Bureau of Investigation at Thrifty Motors, 1301 East Minor Street, Stockton, California. Later the same day, Dorothy Lee Haynes, also a co-defendant below, was arrested in Stockton. At the time of the arrest, defendant had concluded the sale of two Cadillac automobiles, subsequently determined to have been stolen in Chicago, Illinois, to Thrifty Motors and had in his possession the check of that company in the amount of $9500. (Gov't. Ex. No. 10) The indictment, filed March 6, 1964, (R. 2) charges all four defendants in the first count with conspiracy to transport stolen automobiles in interstate commerce with knowledge that the automobiles had been stolen. Counts Two through Nine charged specific substantive violations against individual defendants involving the sale and interstate transportation of stolen automobiles between April 22, 1963 and the date of the arrest.

In all, six Cadillac automobiles were involved. The government proved on the trial by the testimony of the owners or persons in legitimate possession of these automobiles that each had been stolen somewhere in the Chicago area. (T. 128-196, 232-256) The government also proved by the testimony of the representatives of the three California automobile agencies to whom the cars were sold that some, or all, of the defendants were involved in the sale of each of the cars in California. (T. 335-390) There was also proof in each instance that a false vehicle identification number had been superimposed on the vehicle over the true identification number. (T. 268 et seq.) There was, in addition, testimony of representatives of the Offices of the Secretaries of State of

both Illinois and California pertaining to the procedure used for registering automobiles in their respective states and the actual registration in both states, of the six automobiles involved. (T. 196-232, 256-268) The owner of one automobile, Ralph Sieben, testified that a Phillips Oil Company credit card, (Gov't. Ex. 7) and a Texaco credit card, (Gov't. Ex. 8) were in the glove compartment of his vehicle at the time it was stolen. (T. 155) These two exhibits, in addition to a purported Illinois driver's license in the name of Ralph Sieben (Gov't. Ex. 9) which the proof indicated was counterfeit (T. 963-978) were seized from the defendant Santoro after his arrest and admitted into evidence. (T. 500)

Prior to trial, a motion was made on behalf of all the defendants including Santoro to suppress evidence on the ground that it had been obtained through the use of telephone wire-tapping, unlawful under 47 U.S.C. § 605, by agents of the Federal Bureau of Investigation. (R. 62) Counsel offered to support the motion by the affidavit of Santoro as well as an individual named Ann Moreno. Both affidavits refer to a telephone call placed by defendant Santoro from the San Joaquin County Jail after his arrest and Miss Moreno's affidavit stated further that Federal Bureau of Investigation agents subsequently interviewed her and unmistakably exhibited knowledge of the contents of the telephone call from Santoro. No hearing was held in the Court below on this motion. The factual situation in respect to this motion to suppress is complicated by the existence of a prior indictment, No. 13767 in the District Court, which was eventually superseded by the instant indictment. Pre-trial motions, however, had been made under the prior indictment and had been heard by the Court, Judge Halbert presiding. No evidentiary hearing was held on the motion to suppress

in that case either; however, the Court did set a time and place for such a hearing. After the return of this indictment, similar, if not identical, pre-trial motions were advanced by defendants and these were considered by the Honorable Thomas J. McBride, Judge of the District Court on May 5, 1964. (T. 12 et seq.) After an extended discussion of the motion to suppress the Court, Judge McBride stated that he would give counsel for the defendants an opportunity to determine whether there was factual evidence justifying the charge of illegal wiretapping. (T. 46) In ruling on all the pre-trial motions, however, Judge McBride merely took the motion to suppress under submission. (T. 57) When the case came on for trial, on June 21, 1965, before Judge Halbert, the motion to suppress was again renewed by trial counsel for defendants prior to the commencement of the trial. (T. 81 et seq.) After counsel stated his intention to produce evidence upon the motion to suppress, the Court suggested that the motion was late, (T. 83) and an extended discussion followed in which the government took the position that the Court was not bound to hold a hearing on the motion to suppress because the motion had not been perfected by the introduction of evidence during the extended period between indictment and trial. The attorney for the government suggested the reservation of the motion until trial when any issue of telephonic interception could be raised in connection with any specific evidence the government introduced. The motion was taken under advisement by Judge Halbert and on June 22, 1965, the following day, when the case was called for trial, the Court ruled as follows:

> "Secondly, as to motion for—at least tentative motion for a further hearing on the motion to suppress, that motion is denied, but it may be renewed during

the course of the trial of the case, and you are ready to proceed, I assume, with the trial of the case at 10:00 o'clock?" (T. 102)

After the jury was selected and sworn, counsel for the defendant advanced an additional motion to suppress all of the evidence in the case based upon illegal wiretapping and further for a hearing in the absence of a jury on this issue; that motion was similarly denied. (T. 105) Counsel again moved to suppress at the conclusion of the Government's case-in-chief. (T. 534) After discussion of counsel's proffer of evidence on the motion, the court denied it. (T. 555) At the conclusion of all the evidence the motion was again renewed (T. 995) and again denied. (T. 998) After verdict the question was again included in defendant's written motion for a new trial. (R. 100) The record then indicates that no evidentiary hearing was ever held under this indictment and no opportunity was ever afforded defendants to question the appropriate agents of the Federal Bureau of Investigation to determine whether or not information gained by telephonic intercepts, illegal under 47 U.S.C. § 605, if indeed any such there were, contributed in any respect to the development of the evidence presented by the government and relied upon to sustain the conviction of defendant.

In addition to the evidence summarized above, the government closed its case with the testimony of three F.B.I. agents to the statements of each of the four defendants made after their arrest on July 19, 1963. (T. 438-531) The three male defendants who were first arrested were taken to the office of the Federal Bureau of Investigation and interrogated separately. LaMagna made a statement which was reduced to writing at that time and

place and admitted as Government's Exhibit 62. (T. 477) The same defendant was questioned further on the following day at the San Joaquin County Jail and a second statement was taken which was admitted into evidence at Government's Exhibit 63. (T. 479) Both statements concerned the defendant Santoro and indicated that his was a central role in the scheme. Similar remarks by the defendant Coduto after his arrest were admitted into evidence although they had not been reduced to writing. (T. 438 et seq.) In connection with the Coduto statements, the Court *sua sponte* instructed the Jury at the time of the testimony concerning those statements, that the Jury was not to consider such statement against any defendant but Coduto.

> "The Court: Now, ladies and gentlemen of the jury, I will on my own motion tell you that any statement made by one of these defendants after this alleged offense occurred is binding upon that defendant and that defendant alone. In other words, it is not binding upon the other defendants." (T. 448)

The defendant Haynes, arrested later in the same day, also was interrogated and her false exculpatory statement was admitted into evidence without limiting instruction, although it concerned the defendant Santoro. (T. 506-511)

REASONS FOR GRANTING THE WRIT

1. The Failure to Conduct an Evidentiary Hearing on the Wiretap Issue.

No hearing was held in the Court below upon the motion to suppress evidence advanced by the defendant Santoro and based upon his allegations of wiretapping. If telephone intercepts of the kind which are unlawful under 47 U.S.C. 605 contributed to the investigation of the case against Santoro by the Federal Bureau of Investigation, such evidence as the government developed, either directly or derivatively, from such intercepts unquestionably should have been suppressed and excluded. *Nardone* v. *United States,* 308 U.S. 338. The question in this case, therefore, simply stated, is whether a hearing should have been held outside of the presence of the jury to explore the wiretapping question thoroughly. It is no answer to say that defendant was afforded such an opportunity in a prior case on which he was never brought to trial. We contend that the District Court was bound at some stage of the proceedings in this case below to hold such a hearing.

In the course of its opinion per Circuit Judge Barnes, the Court of Appeals stated:

> "The evidence upon which the government's case rests appears on its face to have been wholly unrelated to the single alleged post-arrest tap and to have been the product of normal investigation . . ."

It is just such a determination that we believe two recent decisions of this Court require to be made after an evidentiary hearing in the District Court upon findings of fact bottomed on evidence adduced by the parties for

that purpose. In *Kolod* v. *United States*, ... U.S. ..... 19 L.Ed.2d 962 (Jan. 29, 1968) this Court stated:

> "We cannot accept the Department's ex parte determination of relevancy in lieu of such determination in an adversary proceedings in the District Court." 19 L.Ed.2d 962, 964

That case, as well as *Hoffa* v. *United States*, 387 U.S. 231, involved the disclosure of electronic eavesdropping activity by the government. In this case no such disclosure has yet been made. Certainly, however, if no intercept, in violation of 47 U.S.C. Section 605, occurred, then defendant is hardly in a position to prove any such intercept at a hearing. We contend merely that Santoro is entitled to:

> "[A]n opportunity to establish, if he can, that the interception of this particular conversation, or of some other conversations, vitiated in some manner his conviction." *Hoffa* v. *United States*, 18 L. Ed. 2d 738, 741.

The opinion of the Court of Appeals would place upon a defendant in a criminal case the burden of identifying with specificity the precise evidence which he contends to have a tainted source as a prerequisite to the conduct of an evidentiary hearing calculated to prove or disprove just that. We think this is an unfair burden. Defendants, and their counsel, are very seldom privy to the illegal activities of governmental agents. The only practical method whereby a defendant could make any showing that evidence relied upon by the government is tainted by wiretaps, either directly or derivatively, is to elicit from the particular agents of the government under oath precisely what their activities were in this connection and what use has been made of the results thereof. This

case provides an illuminating example. If, as the Court of Appeals appears to have assumed, the conversation was overheard at the San Joaquin County Jail, it may well be that it did not contribute to the development of the evidence against petitioner. It is also possible, however, that the conversation was overheard as a result of illegal activities of governmental agents or even local police in Chicago, Illinois. If that be true, conversations overheard by such means in the past may very well have contributed in a derivative manner to the development of the evidence that the government relied upon to convict petitioner.

It is our contention, accordingly, that the Court of Appeals in the instant case has decided a substantial federal question in a manner inconsistent with this Court's decisions. We respectfully ask this Court to take the same action here it took in *Kolod* v. *United States.*

2. The Post-Conspiracy Declarations of Co-Defendants.

The statements of the co-defendants LaMagna and Haynes which were admitted without limitation by the Court below were made to agents of the Federal Bureau of Investigation after the arrest of those co-defendants as well as the defendant Santoro on July 19, 1963. We contend, consequently, that these statements amount to post-conspiracy declarations and are, accordingly, not binding upon defendant Santoro nor admissible against him. The problem posed by the admission of such statements was given extensive consideration by this Court in *Delli Paoli* v. *United States,* 352 U.S. 232. In that case involving a conspiracy to possess and transport non-tax-paid alcohol, a full confession of a co-defendant implicating Delli Paoli was admitted into evidence and the con-

viction was affirmed largely because of the meticulous care with which the trial judge instructed the jury limiting the reception of that evidence to the issue of the guilt or innocence of the confessing co-defendant and specifically admonishing the jury not to consider this evidence against Delli Paoli. The opinion in that case set out the following quotation from *Lutwak* v. *United States*, 344 U.S. 604, 617-619:

> "'The Court must be careful at the time of the admission and by its instructions to make it clear that the evidence is limited as against the declarant only. Therefore, when the trial court admits against all of the conspirators a relevant declaration of one of the conspirators after the conspiracy has ended, without limiting it to the declarant, it violates the rule laid down in *Krulewitch*. [*Krulewitch* v. *United States*, 336 U.S. 440.] Such declaration is inadmissible as to all but the declarant . . .'" *Delli Paoli* v. *United States*, 352 U.S. 232, 238.

There is no question that the particular evidence admitted in this case is of the same basic character as that in *Delli Paoli*. It would serve no point to proliferate citation and discussion of the decided cases supporting the inadmissibility of post-arrest statements of co-conspirators without limiting instructions because the rule seems sufficiently well-established not to require that sort of extended discussion.

The question, then, involves essentially the sufficiency of the Court's instructions as clear, forceful and meticulous directions to the jurors not to consider the statements of the co-defendants when determining the guilt or innocence of Santoro. While there may be some basis for a belief in the efficacy of such instructions as were given in the *Delli Paoli* case, that basis evaporates when the

character of the instructions given in this case is considered. In his only roughly contemporaneous instruction, referring to the post-arrest statement of Coduto, but not to those of LaMagna or Haynes, the trial judge spoke of the statement as ". . . [B]inding upon that defendant and that defendant alone. . . ." The jury was told, "[I]t is not binding upon the other defendants." That instruction did not tell the jury not to consider the evidence when determining Santoro's guilt or innocence. The sophisticated concept implicit in the words "binding upon" is difficult of application and definition by trained lawyers and judges, not to speak of a lay jury. Such a charge appears calculated to protect the record, rather than the defendant.

Two portions of Judge Halbert's final instructions to the jury touched upon this issue:

> "Except in the case of the offense of conspiracy, the charge in Count One of the indictment, an admission or incriminatory statement made outside of Court by one defendant may not be considered as evidence against any other defendant not present when the statement was made." (T. 1029)

and:

> "No act or declaration of a conspirator which is committed or made after the conspiracy has been terminated, for instance by its purpose having been fully accomplished or by its objective having ended, is binding upon his co-conspirators and they are not criminally liable for any such acts or declarations." (T. 1045)

Accordingly, while the second quoted portion of the charge may have been unobjectionable, if somewhat bland, what little protection it would afford defendant Santoro was completely undercut by the first quoted portion of

the charge which could well have left the jury under the impression that the objectionable evidence could be considered against the defendant Santoro on the conspiracy count but not on the substantive count, a conclusion without any basis in law and a result precisely contrary to the teachings of *Krulewitch* v. *United States*, 336 U.S. 440. Such a charge is no substitute for the kind of emphatic and specific limiting instruction contemplated by *Delli Paoli* v. *United States*, 325 U.S. 232.

This conclusion, moreover, is buttressed by a consideration of the fundamental and underlying rationale supporting this Court's decision in *Delli Paoli* v. *United States*, 352 U.S. 232. The opinion contains its own justification:

> "It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. Unless we proceed on the basis that the jury will follow the court's instructions where those instructions are clear and the circumstances are such that the jury can reasonably be expected to follow them, the jury system makes little sense. Based on faith that the jury will endeavor to follow the court's instruction, our system of jury trial has produced one of the most valuable and practical mechanisms in human experience for dispensing substantial justice." 352 U.S. 232, 242.

So that Court decided that confessions of co-defendants could be admitted with proper limiting instructions because of the essential place in our system for an abiding faith that jurors will follow the court's instructions when they are clear, unambiguous and simple. To say that the lack of such instructions amounts to harmless error is precisely to contradict that faith. A jury cannot follow clear and simple instructions when the judge does not give them. If the basic premise of our jury system be

that the jury will follow instructions then it is clear that in the absence of instructions it must be an equally basic premise that the jury will consider all of the evidence presented upon the trial. If such error did not affect the substantial rights of Phillip Santoro it must be either because the jury did not follow the instructions given to it or because it would not have followed proper instructions had they been given. Such a conclusion is at war with the reasons underlying the decision in *Della Paoli*.

The situation presented here underscores the need for this Court to provide guidelines to the solution of this ever recurring problem of federal criminal justice. We respectfully submit that the issue is worthy of review by this Court in the exercise of its supervisory power over the administration of criminal justice in the courts of the United States.

CONCLUSION

For the reasons expressed above we believe this case worthy of review in this Court. We repectfully petition this Court to issue its Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

Robert S. Bailey
Le Fevour & Bailey
Three Madison Street
Oak Park, Illinois
Attorneys for Petitioner

March, 1968

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PHILLIP SANTORO,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.
No. 20,412

[December 27, 1967]

Appeal from the United States District Court for the Northern District of California

Before: MADDEN, Judge, United States Court of Claims, and BARNES and MERRILL, Circuit Judges

BARNES, Circuit Judge:

Phillip Santoro was tried and convicted upon an indictment charging him with conspiracy to transport stolen vehicles (18 U.S.C. § 371), the interstate transportation of a stolen motor vehicle (18 U.S.C. § 2312), and knowingly selling a stolen motor vehicle moving in or a part of interstate commerce (18 U.S.C. § 2313). The district court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction of the appeal under 28 U.S.C. § 1291.

Santoro, together with Joseph Coduto, Peter LaMagna and Dorothy Haynes, was engaged in marketing stolen cars. The operation involved the theft of Cadillac automobiles in the Chicago area, their transportation to the

West Coast, the alteration of the vehicle identification numbers and the sale to used car dealers in California. From April through July of 1963, six Cadillacs were stolen in the Chicago area. In April of 1963 two of them were sold by codefendant Haynes to a dealer in Oakland, California. Six weeks later appellant Santoro, using the name Cassar, and Mrs. Haynes returned to the same dealer and sold another of the stolen vehicles. On June 3 appellant and Mrs. Haynes sold another of the stolen vehicles in San Francisco. On July 3 Mrs. Haynes sold a stolen white Cadillac convertible to Thrifty Motors in Stockton, California. The latter Cadillac had been stolen from United City Gas Company and its president, Mr. Ralph Sieben. At the time it was stolen, the glove compartment contained two credit cards issued to Ralph Sieben. On July 19, 1963, appellant Santoro, accompanied by codefendants Coduto and LaMagna, visited Thrifty Motors in Stockton and offered two Cadillacs for sale. F.B.I. agents approached Santoro and warned him of his constitutional rights. Appellant was taken to the F.B.I. office in Stockton and asked to identify himself. He produced two credit cards issued to Ralph Sieben and a false Illinois driver's license in the name of Ralph Sieben. He told F.B.I. agents that he was Sieben, but later changed his story to state that a man named "Ralph" had asked him to transport the cars to the West Coast and had given him the cards to facilitate the sale.

As noted above, Santoro was convicted. On this appeal he raises four alleged errors: (1) that statements of codefendants were admitted into evidence without limiting instructions; (2) that certain exhibits were admitted into evidence though they were the products of an unlawful search; (3) that he was denied the right to counsel; and (4) that the court below denied him a hearing on his claim of wire tapping by government agents. We will consider each claim in order.

I. *Codefendants' Statements*

The post-arrest statements of codefendants Haynes, LaMagna and Coduto were introduced at the trial. Appellant made no objection and requested no instruction limiting the jury's consideration of these statements to the individual declarant. Clearly appellant was entitled to such an instruction. *Krulewitch v. United States,* 336 U.S. 440 (1949). Indeed, it was incumbent upon the court to give such an instruction even though not requested by any of the defendants. *Delli Paoli v. United States,* 352 U.S. 232 (1957), *Lutwak v. United States,* 344 U.S. 604 (1953).

Appellant points out that no limiting instruction was given following the introduction of the statements of Haynes and LaMagna. Appellant fails to mention, however, that when the first of the statements of the codefendants, that of Coduto, was put into evidence, the court sua sponte generally instructed the jury that any one defendant's statement binds only that defendant and no other.[1]

Appellant's claim of error is, actually, not that the jury was not instructed, but that the instruction was not repeated after each defendant's statement. We note that even after the court had instructed the jury after the Coduto statement, appellant's counsel made no request for a repetition of the instruction after the Haynes and LaMagna statements. We cannot agree with appellant that this failure to repeat the instruction was error. The instruction given by the court after Coduto's statement was, by its terms, applicable to the statements of any defendant. We presume, as we must, that the jury so

---

[1] "THE COURT: Now, ladies and gentlemen of the jury, I will on my own motion tell you that any statements made by one of these defendants after this alleged offense occurred is binding upon that defendant and that defendant alone. In other words, it is not binding upon the other defendants." (R.T. p. 448, lines 8-12.) See also R.T. p. 387.

understood it, and that it properly followed that instruction in considering the guilt of each defendant. The evidence, other than the implication contained in these statements, was ample to sustain the jury's verdict. *Cf. Calhoun v. United States,* 368 F.2d 59 (9th Cir. 1966). We find no error in failing to give additional limiting instructions. *Cf. Gilbert v. California,* ..... U.S. ....., No. 223, decided June 12, 1967.

II. *The Search and Seizure*

Appellant contends that Government Exhibits 7, 8, 9 and 10 were erroneously admitted into evidence. Appellant argues that the items were seized pursuant to an arrest which was unlawful because made without a warrant and without probable cause. No motion to suppress within Rule 41 (e), Fed. R. Crim. P. was made prior to trial; and the government contends that appellant's motion to strike was inadequate. The facts of this case, however, make it unnecessary to decide the question of the legality of the arrest.

Exhibit 10 is the check for $9200 presented to Santoro in payment for the two stolen cars sold to Thrifty Motors on July 19, 1963. It was payable to Ralph Sieben, but it was never cashed since it was seized by F.B.I. agents when Santoro was arrested just after he received it. As the government points out, no motion to suppress was made. In addition, as to Exhibit 10, no objection was made to its admission into evidence (R.T. p. 493), and appellant's motion to strike was not directed to it (see R.T. p. 546). Any objection appellant might have had to Exhibit 10 was waived by failure to properly raise any objection in the trial court.

Exhibits 7, 8 and 9 are the two credit cards issued to Ralph Sieben and the false Illinois driver's license, issued in the name of Ralph Sieben, respectively. Appellant objected to their admission into evidence (R.T. p. 501) and moved to strike them (R.T. p. 546). Although it is not completely clear, the basis for the objection and

motion to strike seems to be that Santoro was not taken before a judicial officer as required by Rule 5(a), Fed. R. Crim. P. We need not consider this alleged failure, if there was any failure, because we are of the opinion that Santoro voluntarily surrendered the challenged exhibits to the F.B.I.

Santoro was arrested at the Thrifty Motors lot, and he was warned of his rights at that time. (R.T. p. 492.) At the lot he identified himself as Ralph Sieben. He was taken to the F.B.I. office in Stockton where he was interviewed by Agent Morley. During the interview Santoro, still representing himself to be Sieben, was asked to identify himself. (R.T. p. 500.) At that time he presented to Agent Morley three items of identification, the two credit cards and the false Illinois driver's license. Each bore the name of Ralph Sieben. The items of identification were not seized from Santoro. He had been warned of his rights (R.T. p. 498), but he continued his attempt to deceive Agent Morley. As part of his scheme he offered the three exhibits to establish a false identity, and did so freely and voluntarily. (R.T. p. 501.) In such a case we have no problem of search or seizure, and the exhibits were properly admitted into evidence.

Our resolution of this specification of error is not to be construed as a taeit finding that the arrest in this ease was not supported by probable cause. The record contains little on the question because of the absence of a pretrial motion to suppress. Without a motion to suppress, there is no reason disclosed by the record for the court below sua sponte to inquire into the validity of the arrest.

III. *The Right to Counsel*

Santoro's claim of denial of the right to counsel is based on his responses to questions put to him by Agent Morley:

> "When I [Agent Morley] asked him as to the source of the cards [sic], how come Mr. Sieben got them, he stated that he would rather—he did not want to

answer that for fear of getting Mr. Sieben in trouble. If there was something wrong with the cars, why, he'd rather have his attorney present before he made any statement along that line." (R.T. p. 504, lines 2-7.)

Escobedo v. Illinois, 378 U.S. 478 (1964), was decided before this case was tried, so the principles announced therein apply to this case. *Miranda v. Arizona*, 384 U.S. 436 (1966), was decided after this case was tried, and hence its principles do not apply. *Johnson v. New Jersey*, 384 U.S. 719 (1966). Under *Escobedo* Santoro was clearly entitled to consult counsel in connection with making any statements to F.B.I. agents. Yet here Agent Morley was careful to end any line of questioning with respect to which Santoro indicated he wished to consult counsel. Santoro did not indicate that he wanted an attorney before making *any* statement, and his awareness of his right to counsel is apparent from the quoted testimony. Santoro made it clear to Agent Morley he desired and requested counsel before discussing certain matters. Agent Morley respected Santoro's position. On the record as a whole we cannot say that Santoro was denied the aid of counsel.

IV. *The Alleged Wire Tapping*

It appears that after Santoro's arrest in Stockton he called Miss Marino in Chicago with reference to obtaining bail. In the course of the conversation Santoro requested Miss Marino "to water the plants" and "take out some garbage" in his apartment in Chicago. Thereafter F.B.I. agents visited Miss Marino and asked her if the reference to watering plants or taking out the garbage had any special meaning. Santoro was also asked by F.B.I. agents whether these phrases had any special meaning. Both had said this language had no hidden meaning and had so advised the F.B.I. (R.T. pp. 534-536.) Both Santoro and Miss Marino in the affidavits indicated that they had revealed their conversation to no one else.

At the trial, both prior to and following the government's case, motions to suppress were renewed. Since appellant did not point to the specific evidence which he contended had its source in the wire tap, the court denied the motions. This, appellant asserts, is error. He contends that once the fact of wire tap was established (or, as here, incorporated in an offer of proof), the appellant has met his burden, and the burden is then on the government to establish lack of taint in the evidence upon which it relies. As support appellant cites *United States v. Coplon,* 185 F.2d 629, 636 (2d Cir. 1950), where it was stated:

> "The accused has the burden of proving that the prosecution has in fact 'tapped' his wires; but, if he succeeds in doing so, the burden falls upon the prosecution to prove that the information so gained has not 'led,' directly or indirectly, to the discovery of any of the evidence which it introduces." 185 F.2d at 636.

Accepting arguendo that such is the proper assignment of burden in a proper case, we do not regard it as appropriate here.

The district court was within its discretion in denying appellant's pre-trial motion to suppress on the basis that he had already received one chance to attack the evidence prior to trial and had chosen to do so on affidavits only. The motion was denied without prejudice to its renewal at the close of the government's case. Thus when appellant finally made his offer of proof of the existence of the wire tap, the government's evidence was in and its nature was apparent to the trial judge.

The evidence upon which the government's case rests appears on its face to have been wholly unrelated to the single alleged post-arrest tap and to have been the product of normal investigation and of surveillance founded on pre-arrest suspicion. It related solely to proof of ownership of certain automobiles, engine number altera-

tion, and sale of the same automobiles by Santoro and his codefendants. Testimony was given by the car owners, expert examiners of engine number changes, purchasers of the cars, and FBI agents who were watching the final sale. The district court was understandably at a loss to see how such evidence could be related to a single tapped phone call made by appellant from the Stockton jail following his arrest.

At this point the burden was on the defense to show not only the fact of a wire tap to which the government has access, but to show a tap that was conceivably the source of government evidence. Nothing would be gained by having the government proceed through the time-consuming formality of identifying the source of all of its evidence where that evidence has already been presented to the court and its nature is such as to reject the wire tap as its source. In such a case it is appropriate to place the burden on appellant of pointing to evidence which might by some means have been the product of the tap and whose source he wishes disclosed.

We affirm the denial of the motion to suppress under the facts of this case and we find no error justifying a reversal of the conviction. The conviction is AFFIRMED.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1219

PHILLIP SANTORO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 388 F. 2d 113.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1967. A petition for rehearing was denied on February 9, 1968. The petition for a writ of certiorari was filed on March 11, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

297-585—68

QUESTIONS PRESENTED

1. Whether petitioner's motion to suppress all government evidence on the ground of alleged wiretapping should have been sustained.

2. Whether the trial court adequately instructed the jury that post-arrest statements by petitioner's co-defendants were admissible only against the declarant.

STATEMENT

After a trial by jury in the United States District Court for the Northern District of California, petitioner was convicted of conspiracy to transport stolen automobiles in interstate commerce and of substantive offenses involving the transportation and sale thereof, in violation of 18 U.S.C. 371, 2312 and 2313. He was sentenced to imprisonment for fifteen years (R. 2–6, 92, 108). The court of appeals affirmed.

During a period from early April through July 1963, six Cadillac cars were stolen from various places in the Chicago area and thereafter sold in the vicinity of San Francisco.

In April 1963, petitioner's co-defendant, Mrs. Dorothy Haynes, sold two of the Cadillacs to a dealer in Oakland. The title to one of these cars was in the name of Phillip Cassar, whom she had described as an automobile dealer in Chicago (Tr. 336–345). About six weeks later, Mrs. Haynes returned to this dealer with petitioner, who gave the name of Phillip Cassar, and they sold him a Cadillac bearing Illinois license tags (Tr. 345–349).

On June 3, 1963, petitioner, again using the name of Phillip Cassar, accompanied by Mrs. Haynes, sold another one of the Cadillacs to a San Francisco dealer. Petitioner kept the Illinois license plates (Tr. 355–365). When Mrs. Haynes returned several weeks later, offering another Cadillac for sale, the dealer thought that he recognized the license plates and started to make a call to the Auto Theft Bureau. As he did so, Mrs. Haynes drove away (Tr. 366–367, 371–375).

On July 3, 1963, Mrs. Haynes sold a Cadillac to a Stockton dealer, taking a check therefor payable to Phillip Cassar, whom she described as an elderly Chicago resident (Tr. 383–385, 390–398, 403). On July 19, 1963, petitioner and two co-defendants who had assisted in transporting the vehicles from Illinois, tried to sell two Cadillacs to this same dealer. Their arrest followed (Tr. 404–416, 431, 438–440, 457–458, 492–493). At that time petitioner produced as identification two credit cards and a driver's license, all in the name of Ralph Sieben (Tr. 156–157, 963-973).

Ralph Sieben, of Chicago, Illinois, testified to the theft of his Cadillac from O'Hare Airport at Chicago, in June 1963. He identified the two credit cards in petitioner's possession at the time of his arrest as having been in the glove compartment of the stolen car (Tr. 151–157). The driver's license in Sieben's name which petitioner had in his possession when he was arrested was false (Tr. 156, 963–973).

The vehicle identification numbers on all the vehicles in question had been falsified prior to sale (Tr. 288–301).

Petitioner, when he took the stand, admitted his connection with the sale of the cars. He said they were sold by him as agent for a "Ralph", a casual acquaintance in Chicago (Tr. 711–796).

ARGUMENT

1. On an earlier indictment for the offense here charged, petitioner moved to suppress evidence allegedly obtained by illegal wiretapping. In support of the motion, petitioner submitted affidavits of himself and a Mrs. Moreno that, shortly after his arrest in California, petitioner telephoned Mrs. Moreno in Chicago and told her to water the plants and to be sure to throw out the garbage. He said that F.B.I. agents had thereafter questioned both Mrs. Moreno and himself as to the meaning of this conversation. On January 27, 1964, after hearing oral argument, Judge Halbert continued the matter to February 7, 1964, directing the parties to produce such witnesses as they deemed appropriate for a full consideration of the motion. No witnesses were produced, counsel for petitioner later explaining that this was due to the cost of bringing witnesses from Chicago to California. After the present superseding indictment was returned, petitioner filed a similar motion to suppress, which was heard by Judge MacBride (Tr. 12–13, 37–39). On argument of the motion, the following colloquy took place with regard to Judge Halbert's ruling (Tr. 46):

> The COURT. Well, I know he wouldn't consider it on affidavits, and I don't think I am going to consider it on affidavits either, but

what he has said that if you want a hearing to determine whether there is some factual evidence upon which you can justifiably claim wire tapping, he gave you the opportunity to present that evidence.

Mr. GOLDSTEIN [petitioner's attorney]. Yes, sir, he gave us the opportunity to bring witnesses from Chicago.

The COURT. Very frankly, that is just about what I am going to do.

Petitioner's counsel did not indicate any desire to have such a hearing. The court denied the motion, but without prejudice to petitioner's right to renew it at the time of trial (Tr. 46–59; 1 R. 120).

On the day before trial, petitioner's counsel asked Judge Halbert to hear the motion. The judge expressed surprise that the motion was being brought up at that time, but said that he would rule the following morning. At that time, he overruled the motion but stated that it was without prejudice to renewal during trial (Tr. 81–95, 100–102). At the conclusion of the government's evidence, petitioner's counsel, without producing evidence, moved to strike all the evidence "on the ground that it was unlawfully obtained because of proof of telephonic conversation". He offered to prove the telephone conversation, described above, adding to the previous account only the assertion that both petitioner and Mrs. Moreno had denied to the F.B.I. that the words used had any hidden meaning (Tr. 534–536). The motion was overruled (Tr. 538–541, 554–555).

Petitioner was not denied a hearing on his motion; he failed to make use of the opportunities available both before and during trial to obtain a hearing. If the testimony of Mrs. Moreno was necessary to petitioner's defense and he was financially unable to bring her from Chicago, her presence could have been obtained at government expense. Rule 17(b), F. R. Crim. P. Petitioner's reliance upon *Hoffa* v. *United States*, 387 U.S. 231, and *Kolod* v. *United States*, 390 U.S. 136, is misplaced, since there the government admitted that illegal electronic surveillance had occurred. Here the government did not admit and petitioner did not make any showing of illegal wiretapping.[1]

But at all events petitioner failed to make any showing that the allegedly overhead conversation was in any way relevant to the evidence at the trial. The conversation itself was never alluded to in the testimony and there was not even a suggestion as to how the conversation about flowers and garbage could possibly have led to trial evidence. There was clearly no occasion for the court to sustain petitioner's motion to strike all the government evidence upon the basis of petitioner's irrelevant affidavits.

2. When a post-arrest statement by the defendant Coduto was offered in evidence, the only objection made by counsel was that he had not been taken before a proper judicial officer. This objection was over-

[1] In accordance with the policy of disclosing to the courts instances in which there was illegal electronic surveillance by federal agents, we have determined that there is no information to disclose in this case.

ruled (Tr. 443–446). After the testimony as to the statement was introduced,[2] the court, *sua sponte*, gave the following instruction (Tr. 448):

> Now, ladies and gentlemen of the jury, I will on my own motion tell you that any statements made by one of these defendants after this alleged offense occurred is binding upon that defendant and that defendant alone. In other words, it is not binding upon the other defendants.

The court did not repeat this instruction after statements by other defendants were introduced,[3] but in its final charge, the court told the jury (Tr. 1045):

---

[2] Coduto stated that he had known Ralph Sieben, a bartender in Chicago, for about five months. Approximately two weeks before the interview Sieben had offered him $100 plus expenses to drive a car to California. On July 16 to 18 they and co-defendant LaMagna drove two Cadillacs to San Francisco. On the following day, petitioner obtained a third Cadillac from Mrs. Haynes and the three men drove all three cars to Stockton. During the course of the interview, it developed that Ralph Sieben was actually petitioner (Tr. 446–448).

[3] Co-defendant LaMagna gave an account similar to that of Coduto. He said that he knew petitioner only as "Ralph" (Tr. 460–461). In a later interview he added an account of two previous trips which he had made with petitioner in which Cadillacs were taken to California and sold (Tr. 471–472). These statements were reduced to writing and placed in evidence (Tr. 473–474).

Co-defendant Haynes told the interviewer that on July 19, 1963, a man by the name of Joe had driven her to Stockton in her 1957 Cadillac, and a man named Pete had driven a 1963 Cadillac convertible. She had waited on a street corner while the sale was made (Tr. 507). When asked as to an earlier transaction involving a white Cadillac convertible, she said that this had been given to her for sale by one Phillip Cassar, who had signed the papers over to her. She had used the name of "June

> No act or declaration of a conspirator which is committed or made after the conspiracy has been terminated, for instance by its purpose having been fully accomplished or by its objective having ended is binding upon his co-conspirators and they are not criminally liable for any such acts or declarations. * * *

Petitioner now complains that the court should have given a limiting instruction after the testimony as to the statements of LaMagna and Haynes, but no such request was made by counsel at trial. In view of the simple and comprehensive language which the court used in its initial instruction, that "any statement" by one of these defendants was binding upon him alone, which was repeated for emphasis, the jury could not have been misled. Certainly, in view of the lack of request for repetition of an instruction which had expressly been made applicable to the statements of all the defendants, there was no error. Moreover, the issue was again covered in the final charge.[4] In view of the clear nature of the proof of petitioner's guilt, reinforced by his own testimony identifying himself as having participated in the transportation and sale of these vehicles under an assumed name, there was no ground for reversal. *Calhoun* v. *United States,* 368 F. 2d 59 (C.A. 9).

Johnson" in wiring the proceeds of the sale to Cassar, because that was the name of Cassar's aunt and she wanted to save him any embarrassment, as he was a married man (Tr. 508). She gave vague answers to the question whether she knew a man by the name of Phillip Santoro (Tr. 509).

[4] Petitioner contends that the effect of the final instruction was nullified by another portion of the charge (Tr. 1029):

"Except in the case of the offense of conspiracy, the charge

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

APRIL 1968.

---

in Count 1 of the Indictment an admission or incriminatory statement made outside of Court by one defendant may not be considered as evidence against any other defendant not present when the statement was made."

This instruction, given in a completely different portion of the charge, was appropriate to inform the jury as to the proper scope to be given to statements or representations, such as to petitioner's identity, which were made in the absence of the other defendants. It was a correct statement of the law. *Lutwak* v. *United States*, 344 U.S. 604, 617–619. Cf. Mathes & Devitt, *Federal Jury Practice and Instructions*, §§ 19.10, 25.06, 80.09 (1965).

U.S. GOVERNMENT PRINTING OFFICE: 1968

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

SANTORO *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 1219. Decided June 10, 1968.

PER CURIAM.

The petition for a writ of certiorari is granted. The judgment of the Court of Appeals for the Ninth Circuit is vacated and the case is remanded to that court for further consideration in light of *Bruton* v. *United States*, 391 U. S. —. See *Roberts* v. *Russell*, *ante*, p. —.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE dissent for the reasons stated in MR. JUSTICE WHITE's dissenting opinion in *Bruton* v. *United States*, 391 U. S. —, — (1968).

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.